Supreme Court, U.S.
FILED
OCT 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-6405

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILLIP D. TOMPKINS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Texas Court Of Criminal Appeals

REPLY BRIEF FOR PETITIONER

*EMMETT B. LEWIS
ROBERT K. HUFFMAN
JAMES B. ALTMAN
PATRICIA A. MILLETT
Miller & Chevalier, Chartered
655 Fifteenth Street, N.W.
Suite 900
Washington, D.C. 20005-5701
Telephone: (202) 626-5800
Counsel for Petitioner
**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-8662

TABLE OF CONTENTS

	Page
INTRODUCTION	1
A. The *Beck* Issue	2
B. The *Batson* Issue	6
CONCLUSION	16

TABLE OF AUTHORITIES

Cases	Page(s)
Batson v. *Kentucky*, 476 U.S. 79 (1986)	*passim*
Beck v. *Alabama*, 447 U.S. 625 (1980)	*passim*
Brooks v. *Tennessee*, 406 U.S. 605 (1972)	5
Castaneda v. *Partida*, 430 U.S. 482 (1977)	9
Davis v. *Wechsler*, 263 U.S. 22 (1923)	4
Downes v. *Scott*, 45 U.S. 500 (1846)	8
Enmund v. *Florida*, 458 U.S. 782 (1982)	8
Gardner v. *Florida*, 430 U.S. 349 (1977)	2
General Trading Co. v. *State Tax Commission (Iowa)*, 322 U.S. 335 (1944)	2, 7
Griffin v. *California*, 380 U.S. 609 (1965)	5
Harris v. *New York*, 401 U.S. 222 (1971)	5
Israel v. *Arthur*, 152 U.S. 355 (1894)	8
Jackson v. *Virginia*, 443 U.S. 307 (1979)	4
Jenkins v. *Anderson*, 447 U.S. 231 (1980)	5
Keeble v. *United States*, 412 U.S. 205 (1973)	6
Lefkowitz v. *Cunningham*, 431 U.S. 801 (1977)	5
Leland v. *Oregon*, 343 U.S. 790 (1952)	5
Mathews v. *United States*, ___ U.S. ___, 108 S. Ct. 883 (1988)	4
McGautha v. *California*, 402 U.S. 183 (1971), *vacated*, 408 U.S. 941 (1972)	5
Miedreich v. *Lauenstein*, 232 U.S. 236 (1914)	7
Milk Wagon Drivers Union v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941)	14
Montoya v. *State*, 744 S.W.2d 15 (Tex. Crim. App. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2887 (1988).	2
Mullaney v. *Wilbur*, 421 U.S. 684 (1975)	5
Rougeau v. *State*, 651 S.W.2d 739 (Tex. Crim. App. 1982)	9
Simmons v. *United States*, 390 U.S. 377 (1968)	5
Smith v. *Phillips*, 455 U.S. 209 (1982)	8, 14
Sumner v. *Mata*, 449 U.S. 539 (1981), 455 U.S. 591 (1982)	8
Texas v. *Mead*, 465 U.S. 1041 (1984) (mem.)	9
Thomas v. *Texas*, 212 U.S. 278 (1909)	8
Tison v. *Arizona*, 481 U.S. 137 (1987)	8
United States v. *Salvucci*, 448 U.S. 83 (1980)	5
Vasquez v. *Hillery*, 474 U.S. 254 (1986)	15
Wolfe v. *North Carolina*, 364 U.S. 177 (1960)	7, 14
Woodson v. *North Carolina*, 428 U.S. 280 (1976)	2

Introduction

The arguments on which the State of Texas rests are at war with this Court's precedents. First, the State asserts that this Court's decision in *Beck* v. *Alabama*, 447 U.S. 625 (1980), was satisfied here because petitioner's jury was charged regarding *a* non-capital offense. That assertion misses the point of *Beck*. *Beck* is premised on this Court's concern for rationality and reliability in jury verdicts where the defendant's life is at stake. The test for determining whether *Beck* is satisfied is not the number of instructions given, but whether those instructions respond to the elements in doubt in the State's capital case. Here the evidence left considerable doubt regarding petitioner's intent to kill the deceased, but the court's instructions denied those jurors who were unpersuaded of the petitioner's intent to kill the option of convicting petitioner of a non-intentional killing. The instructions thus denied those jurors the opportunity, required by *Beck*, to return a verdict in conformity with their view of the evidence.

Second, the State reads *Beck* as requiring a lesser included offense instruction in a capital case only if the evidence supporting such an instruction emanates from the defendant. *Beck* does not apply, the State asserts, if the lesser offense is supported by inferences drawn from the prosecution's case. There is no support for this position. In a capital case based solely on circumstantial evidence, the defendant, like the State, has the right to urge the jury to find whatever favorable inferences can be drawn from the evidence, without regard to who produced that evidence.

Next, in arguing that the court of appeals did not violate this Court's decision in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the State seeks to amend, rather than to

defend, the decision of the court of appeals. It asks this Court to affirm the decision below on the basis of factual findings made by the trial court, but specifically rejected by the court of appeals. The State's position conflicts with nearly two centuries of this Court's precedent. The facts on which the Texas Court of Criminal Appeals "founded its judgment are . . . controlling here." *General Trading Co.* v. *State Tax Commission (Iowa)*, 322 U.S. 335, 337 (1944).

We first briefly address the State's position on *Beck* and then its position on *Batson*.

A. The *Beck* Issue

1. The State argues that, since the jury was instructed on the lesser included offense of non-capital intentional murder, Mr. Tompkins was not also entitled to instructions on the lesser included offenses of involuntary manslaughter and criminally negligent homicide.[1] "If Tompkins had been charged with only murder rather than capital murder, he would have had no constitutional entitlement to the requested instructions, even had there been evidence to support them," and the fact that he was "charged with a capital offense should not lead to a different result . . . ." Resp. Br. at 13-14.[2] But of course it should; that is the whole point of *Beck*. 447 U.S. at 637. *See also Gardner* v. *Florida*, 430 U.S. 349, 357-8 (1977) (opinion of Stevens, J.); *Woodson* v. *North Carolina*, 428

[1] The State's suggestion that involuntary manslaughter and criminally negligent homicide are not lesser included offenses of capital murder, Resp. Br. at 13, is incorrect. *See, e.g., Montoya* v. *State*, 744 S.W.2d 15, 28 (Tex. Crim. App. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2887 (1988).

[2] Throughout, references to Respondent's Brief are "Resp. Br."

U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, J.J.).

Tompkins, like Beck, was convicted of a capital offense and sentenced to die. Like Beck, his death sentence rests upon a verdict returned by a jury that was not given the alternative of responding rationally to the evidence by convicting of lesser included offenses which the evidence supported. Perhaps some jurors might have found the elements of non-capital murder rather than capital murder on the record of petitioner's trial; other jurors might not. But a juror who could see no basis for a finding of non-capital murder might well have found the elements of involuntary manslaughter or criminally negligent homicide. To deny such a juror the option of returning a non-capital verdict in conformity with his or her view of the evidence flouts *Beck's* concern for rationality and reliability in judgments that spell life or death.

The State contends that the non-capital murder instruction gave petitioner's jury the "third option" that *Beck* requires in capital cases. Resp. Br. at 12. But that instruction gave the jury no third option on the critical and contested element of intent. Rather, the trial court's instructions required the jury either to find that petitioner intended to kill the deceased or to acquit him. The jury was given no option to convict petitioner based upon a less culpable mental state. Consequently, rather than providing a constitutionally sufficient third option, petitioner's jury instructions, like those in *Beck*, did not respond to the "doubt [raised by the evidence] with respect to an element of [the] capital offense," *i.e.*, petitioner's state of mind. 447 U.S. at 637.

2. The State argues that the question of the sufficiency of the evidence to activate a federal constitutional

rule for adjudicating state-law crimes is a "matter of state law" to which this Court must defer. Resp. Br. at 14-15. To the contrary, it is a matter of federal law for this Court's independent determination. *See Jackson* v. *Virginia*, 443 U.S. 307 (1979); *see also Davis* v. *Wechsler*, 263 U.S. 22, 25 (1923) (the federal courts are obliged "to see that local practice shall not be allowed to put unreasonable obstacles in the way [of the enforcement of federal rights].")

3. The State next contends that a capital defendant cannot urge the jury to return a conviction of a lesser offense upon the prosecution's evidence alone, but can invoke *Beck* "only where the defendant actually presents evidence which creates a factual conflict [with the prosecution's evidence]." Resp. Br. at 15. Otherwise, the State complains, lesser included offense instructions will have to be given in every capital case in which circumstantial evidence creates "the possibility of conflicting inferences from uncontradicted testimony," and "defendants [will be able] to assert inconsistent defenses to their benefit and the unfair detriment of the state." Resp. Br. at 17. But there is nothing wrong with either of these prospects. *See Mathews* v. *United States*, ___ U.S. ___, 108 S. Ct. 883 (1988). Defendants in capital prosecutions based on circumstantial evidence that permits "conflicting inferences" *should* be able to argue inconsistent factual theories and get instructions on all of those that the evidence supports. By definition, the truth of what actually happened in such cases is not known or knowable except by inference. So the defendant, like the State, must be allowed to urge the jury to find whatever favorable sets of facts the "conflicting inferences" will support, and the jury must be allowed to return the full range of verdicts legally implicated by those facts.

What the State in effect argues is that, in order to obtain a lesser included offense instruction in a capital

case, the defendant must submit evidence sufficient to permit a rational juror to convict him of the lesser offense. Resp. Br. at 19-20. Such a rule would contravene the defendant's Fifth Amendment right against self-incrimination and would create the "intolerable" situation in which "one constitutional right [would] have to be surrendered in order to assert another." *Simmons* v. *United States*, 390 U.S. 377, 394 (1968). *Accord United States* v. *Salvucci*, 448 U.S. 83, 89-90 (1980); *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806-07 (1977); *Brooks* v. *Tennessee*, 406 U.S. 605, 612-13 (1972). The State's citation of *Leland* v. *Oregon*, 343 U.S. 790 (1952), for the proposition that the burden of proof may properly be allocated to a defendant (Resp. Br. at 20), confuses the defendant's burden on affirmative defenses, such as insanity, with the State's obligation to prove the defendant guilty of each element of a criminal offense.[3] The State's reliance on *Jenkins* v. *Anderson*, 447 U.S. 231 (1980); *Harris* v. *New York*, 401 U.S. 222 (1971); and *McGautha* v. *California*, 402 U.S. 183 (1971), *vacated* 408 U.S. 941 (1972) (Resp. Br. at 19), likewise, is inappropriate. While a defendant's exercise of his right to remain silent may not always be painless, the State cannot directly penalize a person's failure to waive his Fifth Amendment rights. *Griffin* v. *California*, 380 U.S. 609 (1965); *see also Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977).

---

[3] "[I]n *Leland* . . . the issue of insanity as a defense to a criminal charge was considered by the jury only after it had found that all elements of the offense, including the *mens rea*, if any, required by state law, had been proved beyond a reasonable doubt . . . . [T]he existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Mullaney* v. *Wilbur*, 421 U.S. 684, 705-6 (1975) (Rehnquist, J., concurring) (citations omitted).

4. The State's final *Beck* argument wholly misses the point of *Beck* and of petitioner's brief. It treats petitioner as saying that "the jury was . . . 'required' to draw" the inferences supporting conviction of involuntary manslaughter or criminally negligent homicide. Resp. Br. at 18. The point made in the passage, which respondent quotes out of context, is that *if* the jury found petitioner killed the deceased but that such killing was not intentional (the *mens rea* of capital murder), it was required to draw one of two other mutually exclusive inferences—the only remaining legally relevant inferences under the Texas Court of Criminal Appeals' construction of the applicable Texas law and of this record. The first permissible inference was that petitioner was aware of the risk of death that his conduct created, although he did not intend to kill the decedent (the *mens rea* of involuntary manslaughter). The second permissible inference was that petitioner was not aware of the risk of death that his conduct produced (the *mens rea* of criminally negligent homicide). Precisely because a rational jury was *not* required to draw one rather than another of these inferences—or the inference of intentional killing—*Beck* requires that instructions be given on each of the offenses. *See Keeble* v. *United States*, 412 U.S. 205, 212-3 (1973). That obligation could not be cancelled, as the court of appeals sought to do, by reasoning that the record demonstrated advertence too clearly to allow instructions on negligent homicide and, at the same time, demonstrated inadvertence too clearly to require instructions on involuntary manslaughter.

B. The *Batson* Issue

1. The court of appeals approved the peremptory challenge of prospective juror Green on the ground that the prosecutor's explanation for the challenge, *i.e.*, Mr. Green's employment as a postal worker, was a "racially neutral explanation" and, therefore, satisfied the requirements of *Batson*. J.A. at 72. The State terms "the conclusion reached by the court of appeals . . . incomprehensible . . ." and refuses to defend it. Resp. Br. at 29. The State, instead, asks this Court to affirm the judgment of the court of appeals on the basis of the trial court's findings of fact, which were rejected by the court of appeals.

The State's entire argument rests upon the premise that "[b]ecause the Court of Criminal Appeals is not a fact-finding court and because the factual bases it found to be the reasons for the prosecutor's exercise of their [sic] peremptory strikes are at odds with the record and the findings of the trial court . . . the proper focus of this Court is on the findings of the trial court and not the erroneous and unsupported conjectures of the court of appeals." Resp. Br. at 22. This effort to nullify the factual findings of the Texas Court of Criminal Appeals offends every principle of federalism and appellate review.

For more than a century, this Court has accepted as binding, for purposes of its review of a state court judgment, the factual bases on which the judgment of the highest court of the state is founded. "The facts on which [the highest state court] founded its judgment are of course controlling [in this Court]" *General Trading Co.* v. *State Tax Commission (Iowa)*, 322 U.S. 335, 337 (1944). *See also Wolfe* v. *North Carolina*, 364 U.S. 177, 194-5 (1960) ("The judgment before us for review is the judgment which the Supreme Court of North Carolina made on the record before it, not the action of the state trial court."); *Miedreich* v. *Lauenstein*, 232 U.S. 236, 243 (1914) ("This Court has repeatedly held that in cases coming to it from the supreme court of a state, it accepts

as binding the findings upon issues of fact duly made in that court."). *See also Israel* v. *Arthur*, 152 U.S. 355, 362 (1894); *Downes* v. *Scott*, 45 U.S. (4 Howard) 500, 502 (1846).

Even in habeas corpus proceedings, the federal courts are required to defer to state appellate court findings of fact. *Sumner* v. *Mata*, 449 U.S. 539 (1981), and 455 U.S. 591 (1982) (*per curiam*). *A fortiori*, on direct review of a state court judgment, this Court does so. *See, e.g., Tison* v. *Arizona*, 481 U.S. 137 (1987). Where the highest court of a state has made findings contrary to those of a state trial court, it is the appellate court's findings, not the trial court's, that are controlling in this Court. *See, e.g., Enmund* v. *Florida*, 458 U.S. 782 (1982).

Smith v. *Phillips*, 455 U.S. 209 (1982), (Resp. Br. at 22 n.5), has nothing at all to do with this point. *Phillips* concerns a respondent's right to stand on legal grounds distinct from those on which it prevailed below. It does not license respondents, any more than petitioners, to stand on a version of the facts that the state's highest court explicitly found unsupportable upon the record.

The State's current attempt to resuscitate the trial court's findings stands in sharp contrast to its position in the virtually identical case of *Thomas* v. *Texas*, 212 U.S. 278 (1909). In *Thomas*, the petitioner was a black man convicted of capital murder. He argued, on appeal, that his conviction was secured in violation of the Fourteenth Amendment because the prosecutor excluded blacks from his grand and petit juries. The only difference between these two cases is that, in *Thomas*, the appeals court, "after a full review of the testimony," wholly affirmed the findings of the trial court. 212 U.S. at 280. In this Court, Texas argued that the question of prosecutorial motive

was "a pure question of fact; and this court will not revise the decision of the highest court of the State thereon." *Ibid.* This Court agreed, holding "that questions of fact will not be reviewed by this Court on writs of error to state courts." *Id.* at 281. Texas is apparently only content with this rule when the findings of its court of appeals support its cause.[4] When a court of appeals' opinion becomes inconvenient, Texas slaps on the label of "erroneous and unsupported conjectures," (Resp. Br. at 22), and seeks to suspend the general rule of deference.[5]

2. Even if the State were not bound by the findings on which the court of appeals founded its judgment, there is

---

[4] Respondent has no difficulty embracing the doctrine of deference when it believes its operation will fortify Texas' position. *See* Resp. Br. at 14-15.

[5] Texas seeks to bolster its position by arguing that the court of appeals is not properly a fact-finding court and, therefore, should have deferred to the trial court's findings. However, the level of review applied by the Texas Court of Criminal Appeals in this case was neither novel nor unique. The court of appeals has assumed the task of indepth review in other areas. *See, e.g., Rougeau* v. *State*, 651 S.W.2d 739 (Tex. Crim. App. 1982) (*en banc*), *cert denied*, ____ U.S. ____, 108 S. Ct. 1586 (1988) (the court of appeals reviewed the evidence and reversed the trial court's exclusion of a juror on *Witherspoon* grounds); *Castaneda* v. *Partida*, 430 U.S. 482, 489 (1977) (court of appeals reviewed the merits and affirmed trial court's finding of no *prima facie* case of discrimination in selection of grand jurors).

Furthermore, the question of how deferential a state appeals court should be to a state trial court is purely a question of state law. *See Texas* v. *Mead*, 465 U.S. 1041, 1044 n.2 (1984) (mem.) ("The Texas courts are of course free, as a matter of state law, to decide for themselves what deference shall be given by appellate courts to the findings of trial courts.") (Rehnquist, J., dissenting from denial of certiorari). As such, any claim that the court of appeals exceeded its authority, absent a violation of a distinct federal right, does not present a federal question open to review in this Court.

no basis for challenging those findings here. The State argues that the court of appeals erred in rejecting the trial court's finding that Mr. Green was challenged because he (i) "changed his opinion on the propriety of the death penalty," (ii) responded to questions during *voir dire* with "nonverbal [answers] or 'yeahs,'" (iii) "vacillated regarding his ability to follow the law of causation," and (iv) "indicated that he might require evidence of premeditation." Resp. Br. at 22. The State argues that these findings should not have been rejected because there was evidence in the record to support them. But that would not be the test even if the State were free to challenge the court of appeals' decision to reject these findings. In order to overturn the court of appeals decision, the State would have to show that there was no record support for that decision. Such a showing could not be made here.

Although the trial court found that Mr. Green was challenged because he had difficulty with certain legal concepts, after "reading . . . the entire jury selection process," the court of appeals disagreed. J.A. at 71. It found that "this prospective black venireperson's answers . . . did not indicate a bias or prejudice against any phase of the law pertinent to this case." *Id.* It further found that this juror's "answers to questions asked did not indicate an inability on his part, that was any greater or any less than the unchallenged venirepersons, to understand the law or to apply it impartially." *Id.* There was ample support in the record for these conclusions.

Mr. Green was questioned extensively to determine whether he harbored any bias or prejudice with respect to the law relevant to the case. On the propriety of the death penalty, Mr. Green was first questioned by the Court:

> THE COURT: Consequently, I must ask you, sir, whether or not you have any religious; moral; or

> conscientious scruples—or scruples of any sort, for that matter—against the infliction of death as punishment for crime in a particular case?
>
> JUROR GREEN: No.
>
> Q. Am I right in assuming that would have no bearing on your deliberations regarding the guilt or innocence of this defendant?
>
> JUROR GREEN: Yes, ma'am.

R. Vol XVI pp. 95-96. Mr. Green was then questioned by the prosecutor:

> Q. I believe that you indicated to [the Court] that you had no objection to [the death penalty]; is that correct?
>
> A. Yes ma'am.
>
> Q. Have you always felt that way?
>
> A. Well, I don't know. I guess so. But then, again, it's like you said. Sometimes I felt that way and sometimes I didn't.

R. Vol. XVI pp. 100-101. After Mr. Green testified that his wife did not favor the death penalty, the prosecutor asked:

> Q. But you don't feel that way?
>
> A. (Juror shakes head.)
>
> Q. Would it bother you . . . to be a juror that renders a . . . verdict that . . . would require the Judge . . . to assess the death penalty?
>
> A. I don't know . . . . I haven't been through that thing; so I can't say what I would feel afterwards.
>
> Q. Thinking about it ahead of time, now does it give you any problem?
>
> A. No. Not now.

R. Vol. XVI pp. 101-102.

Although the State includes a portion of this testimony in its supplemental appendix, the appendix does not include the last question and answer quoted above or the court's examination of Mr. Green on this issue.

Similarly, the portion of Mr. Green's examination on the law of causation which is quoted by the State, (Resp. Br. 24-25), omits the final question and answer of Mr. Green's examination on this subject, which was as follows:

> THE COURT: It is kind of complicated. But could you follow that if the Court told you that was what the law was?
>
> JUROR GREEN: I could follow it.
>
> THE COURT: Down the line you might want to take that into consideration when you are trying to deal with the fellow, but the law supplies that in getting from here to there. It says if you do something that is illegal to begin with, then you are responsible for whatever else happens as a result of what you did, the idea being that if that fellow hadn't gone in the first place, nothing would have happened.
>
> JUROR GREEN: I understand.
>
> THE COURT: Fine.

R. Vol. XVI pp. 109-110.

Finally, the portion of Mr. Green's examination on the law of premeditation, which is quoted by the State, is also incomplete. *See* Resp. Br. at 27. At the conclusion of the testimony quoted by the State, Mr. Green answered "I don't think so," when asked if he would want the State to show premeditation. The balance of the Green testimony was as follows:

THE COURT: What she is getting at, Mr. Green, is although it is completely normal to say "I don't think" or "I believe so," everybody says that. In courtrooms it makes lawyers nervous. And what she is trying to ask you to do is to give her a yes or no answer. That's all that she was trying to ask for there.

QUESTIONS BY MRS. DAVENPORT:

Q. So would that be a yes or no?

THE COURT: Run the question by him again.

A. I think I am nervous.

THE COURT: I imagine you are. If you weren't nervous, Mr. Green, you would be the first person that ever sat on that chair that wasn't nervous.

A. Would you repeat?

QUESTIONS BY MRS DAVENPORT:

Q. Would you require me to show you some premeditation on his part before you could find him guilty?

A. No.

Q. Thank you.

R. Vol XVI at pp. 116-117.

After reviewing this testimony, as well as the "entire jury selection process," the court of appeals concluded that Mr. Green's answers to these questions did not explain the prosecutor's decision to peremptorily challenge this juror. J.A. at 71. The fact that the State would reach a different conclusion based on its review of the evidence, (Resp. Br. at 45), does not justify a departure from the long established rule that, where the highest court of a state has made findings contrary to those of a state trial court, the findings on which the highest state

court grounded its judgment are controlling for purposes of this Court's review. *See Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287, 294 (1941); *Wolfe* v. *North Carolina*, 364 U.S. at 194-95.

In sum, the State seeks to amend—not defend—the judgment below. Rather than propound alternative legal arguments for its case, like the respondent in *Smith* v. *Phillips*, *supra.*, the State wants to eject from the case entirely those specific components of the court of appeals opinion with which it disagrees. There is no precedent for the proposition that a respondent may confine this Court's review to the skeletal remnants of a comfortably redacted court of appeals opinion.

3. The State misunderstands petitioner's argument with respect to the challenge of prospective juror Thomas. Petitioner does not argue, as the State asserts, that "the prosecutor's reason for the challenge [must be] articulated with such precision that it can be demonstrated upon retrospective review to fully correspond with the record." Resp. Br. at 31-32. Rather, petitioner argues that once the explanation provided by the prosecutor is rejected by the court of appeals, the challenge may not be affirmed on the basis of an explanation provided by the court but not offered by the prosecutor. Pet. Br. at 39-40. To do so would be to ignore the purpose of the *Batson* inquiry: *Batson* requires testing the *actual* reason offered by the prosecution to see if it is genuine or pretextual. If the reason offered is contradicted by the record, it cannot be accepted as genuine. *Id.*

The State again misses the point when it argues that the court of appeals properly refused to consider the juror comparison offered by petitioner. The State's assertion that "the court of appeals properly refused to consider

matters which were not presented to the trial court," (Resp. Br. at 39), misunderstands what is at issue. The "matters" to which the State refers are inconsistencies between the prosecutor's treatment of black and white venirepersons who shared common characteristics apart from race. Such comparisons are in no way "based on evidence which was not presented to [the trial] . . . court." Resp. Br. at 40. They are based solely upon the recorded *voir dire* proceedings. The State confuses "evidence . . . not presented" to the trial court with an analysis of the evidence from a broader perspective than was argued to the trial court. That confusion was dispelled by *Vasquez* v. *Hillery*, 474 U.S. 254 (1986).

Finally, the State argues that, had the court of appeals considered the juror comparison, it would have reached no different conclusion with respect to the Thomas challenge. Resp. Br. at 44. The State bases its argument on an assertion that, while other jurors "apparently had difficulty understanding some of the principles of law put to them, they also stated without reservation that they could, in fact, apply the law once it had been adequately explained." *Id.* Thomas, the State asserts, was different. "She was simply noncommittal as to whether she could apply the law as she understood it and find a person guilty of capital murder in the absence of direct evidence." *Id.* The record belies this assertion.

When the law of circumstantial evidence was explained to Ms. Thomas, she too "stated without reservation that [she] could . . . apply the law." *Id.*

> Q. . . . now one of the tools so to speak in doing that, the law of circumstantial evidence. And you are saying that you can apply that law to a given set of facts.
>
> A. Yes, I could.

R. Vol. XI at pp. 72-78. Consequently, had the Court considered the juror comparison, it would have seen that Ms. Thomas' ability to apply the law of circumstantial evidence was as unqualified as that of the white jurors who were not challenged.

CONCLUSION

For the foregoing reasons and for the reasons set forth in petitioner's opening brief, the judgment below should be reversed.

*Emmett B. Lewis
Robert K. Huffman
James B. Altman
Patricia A. Millett
Miller & Chevalier, Chartered
655 Fifteenth Street, N.W.
Suite 900
Washington, D.C. 20005-5701
Telephone: (202) 626-5800
Counsel for Petitioner
**Counsel of Record*